A

MTD PRIME SDN BHD v. SEE HWEE KEONG & ORS AND ANOTHER APPEAL

COURT OF APPEAL, PUTRAJAYA
IDRUS HARUN JCA
BADARIAH SAHAMID JCA
B HARMINDAR SINGH DHALIWAL JCA
[CIVIL APPEALS NO: C-04(NCVC)(W)-372-11-2014 &
C-04-(NCVC)(W)-365-11-2014]
12 JULY 2016

C ***TORT:*** *Negligence – Contributory negligence – Determination of – Whether prior establishment of negligence necessary before establishing contributory negligence – Whether finding of contributory negligence justified on evidence*

TORT: *Trespasser – Road under construction – Use of road for construction works – Whether user could be construed as trespasser as road not gazetted as highway*
D

TORT: *Vicarious liability – Subcontractor – Use of road for construction works – Accident – Claim for damages – Whether subcontractor an independent contractor – Whether main contractor vicariously liable for negligence of independent subcontractor*

E MTD Prime Sdn Bhd ('MTD Prime') was the main contractor in charge of the construction of the Pantai Timur Highway ('LPT'). Ab Khaid was the employee of a subsidiary company of Ireka Construction Sdn Bhd ('Ireka Construction') and was the driver of a bulldozer owned by Ireka Construction. Ireka Construction was the subcontractor hired by MTD
F Prime to perform works in the construction of the LPT. Swee Hee Keong ('plaintiff'), was an employee of a company which was in charge of supplying, installing and testing the toll system at LPT. Whilst the plaintiff was driving along the LPT, the bulldozer driven by Ab Khaid suddenly made a U-turn into the plaintiff's right of way and collided with the car driven by
G the plaintiff. At the time of the accident, LPT was not opened to the public. The plaintiff commenced an action against Ab Khaid, Ireka Construction and MTD Prime claiming damages for injuries suffered. The Sessions Court found the plaintiff 90% liable as he was driving fast and Ab Khaid 10% liable for the accident. Ireka Construction and MTD Prime were held not liable.
H The plaintiff appealed against the Sessions Court's decision to the High Court. The High Court Judge held that the bulldozer belonged to Ireka Construction and as such, Ireka Construction was vicariously liable; and MTD Prime as the main contractor which appointed Ireka Construction had failed to ensure the safety of the passage at LPT. In particular, it had failed to ensure that the LPT was safe for the plaintiff and was therefore also
I vicariously liable in negligence. In the circumstances, the High Court allowed the plaintiff's appeal and varied the Sessions Court's decision in that the plaintiff was held 30% liable and Ireka Construction and MTD Prime

were found to be 70% liable. Aggrieved with the High Court's decision, MTD Prime appealed *vide* appeal 372 and Ab Khaid and Ireka Construction appealed *vide* appeal 365.

Held (dismissing appeal 365; allowing appeal 372 with costs)
Per Harmindar Singh Dhaliwal JCA delivering the judgment of the court:

(1) The plaintiff's cause of action against MTD Prime was premised on occupier's liability. The issue of vicarious liability was never part of the plaintiff's pleaded case against MTD Prime. The High Court, however, found liability against both Ireka Construction and MTD Prime on the basis of vicarious liability. In view of the foregoing, the High Court Judge had misapprehended the plaintiff's claim. (paras 9-11)

(2) The main contractor cannot be held vicariously liable for the negligence of the subcontractor who is in effect an independent contractor. In the instant action, there appeared to be no dispute that Ireka Construction was an independent contractor. There was also no evidence led to show that MTD Prime was in control of the actual performance of the works by Ireka Construction. (paras 12 & 13)

(3) On the claim under occupier's liability, the same principle applies. MTD Prime had entrusted the works to Ireka Construction and was not directly involved with the works which resulted in the accident. There was no issue of whether MTD Prime owed a direct duty to the plaintiff. For these reasons, there could be no liability against MTD Prime. As such, the interference by the High Court in this regard was unwarranted. In the circumstances, the appeal by MTD Prime *ie*, appeal 372 must succeed. (para 14)

(4) The Sessions Court Judge was in serious error in determining the negligence of the plaintiff. This was clearly the wrong approach. The duty of the trial judge is to first determine negligence of the defendants. It is only after this determination that a consideration of contributory negligence would follow. If the Sessions Court Judge had followed this approach, the Sessions Court Judge would have determined, as the High Court Judge found, that negligence was proved against Ab Khaid. However, since the plaintiff was driving at an unsafe speed, this would have contributed to the accident. In the circumstances, contributory negligence on the part of the plaintiff to the tune of 30% would not be an unreasonable assessment. (paras 16, 18, 22 & 23)

(5) Ireka Construction had admitted ownership of the bulldozer in its pleaded defence. It was further admitted that Ab Khaid was operating the bulldozer with Ireka Construction's consent. Ab Khaid was an agent of Ireka Construction when operating the bulldozer at the time of the accident. Therefore, vicarious liability of Ireka Construction could not be doubted. (para 23)

(6) Ab Khaid and Ireka Construction also sought to evade liability on the ground that since the LPT was under construction and not gazetted as a highway, it could not come within the statutory definition of 'road' under s. 2 of the Road Transport Act 1987. It was accordingly asserted that this was not a road accident but a construction site accident. This argument overlooked the full definition of 'road' under s. 2 as 'road' means any public road and any other road to which the public has access. The definition also includes a road under construction. Ab Khaid and Ireka Construction's contention was therefore without merit. The net effect was that MTD Prime incurred no liability in this accident. (paras 30 & 32)

Bahasa Malaysia *Headnotes*

MTD Prime Sdn Bhd ('MTD Prime') merupakan kontraktor utama yang bertanggungjawab mengendalikan pembinaan Lebuhraya Pantai Timur ('LPT'). Ab Khaid adalah pekerja anak syarikat Ireka Construction Sdn Bhd ('Ireka Construction') dan merupakan pemandu jentolak yang dimiliki Ireka Construction. Ireka Construction adalah subkontraktor yang diupah oleh MTD Prime untuk mengendalikan kerja-kerja pembinaan LPT. Swee Hee Keong ('plaintif'), adalah seorang pekerja syarikat yang bertanggungjawab membekal, memasang dan menguji sistem tol di LPT. Ketika plaintif sedang memandu di sepanjang LPT, jentolak yang dipandu Ab Khaid tiba-tiba membuat pusingan-U ke dalam hak laluan plaintif dan bertembung dengan kereta yang dipandu oleh plaintif. Pada masa kemalangan tersebut, LPT tidak dibuka kepada orang ramai. Plaintif memulakan suatu tindakan terhadap Ab Khaid, Ireka Construction dan MTD Prime menuntut ganti rugi bagi kecederaan yang dialami. Mahkamah Sesyen mendapati plaintif bertanggungan 90% kerana dia memandu dengan laju dan Ab Khaid bertanggungan 10% bagi kemalangan tersebut. Ireka Construction dan MTD Prime diputuskan tidak bertanggungjawab. Plaintif merayu terhadap keputusan Mahkamah Sesyen kepada Mahkamah Tinggi. Hakim Mahkamah Tinggi memutuskan bahawa jentolak tersebut adalah milik Ireka Construction, oleh itu, Ireka Construction adalah bertanggungan secara vikarius; dan MTD Prime sebagai kontraktor utama yang melantik Ireka Construction gagal memastikan keselamatan laluan di LPT. Khususnya, ia gagal untuk memastikan bahawa LPT selamat untuk kegunaan plaintif dan oleh itu juga adalah bertanggungan secara vikarius untuk kecuaian. Dalam keadaan ini, Mahkamah Tinggi membenarkan rayuan plaintif dan mengubah keputusan Mahkamah Sesyen di mana plaintif didapati bertanggungan 30% dan Ireka Construction dan MTD Prime didapati bertanggungan 70%. Terkilan dengan keputusan Mahkamah Tinggi, MTD Prime merayu melalui rayuan 372 dan Ab Khaid serta Ireka Construction merayu melalui rayuan 365.

Diputuskan (menolak rayuan 365; membenarkan rayuan 372 dengan kos) Oleh Harmindar Singh Dhaliwal HMR menyampaikan penghakiman mahkamah:

(1) Kausa tindakan plaintif terhadap MTD Prime adalah berdasarkan liabiliti penghuni. Isu liabiliti secara vikarius tidak pernah menjadi sebahagian daripada kes yang diplidkan plaintif terhadap MTD Prime. Mahkamah Tinggi bagaimanapun mendapati liabiliti terhadap kedua-dua Ireka Construction dan MTD Prime atas dasar liabiliti secara vikarius. Memandangkan keadaan sedemikian, tuntutan plaintif telah disalah faham oleh plaintif.

(2) Kontraktor utama tidak boleh didapati bertanggungan secara vikarius ke atas kecuaian subkontraktor yang merupakan kontraktor bebas. Dalam tindakan ini, tiada pertikaian bahawa Ireka Construction adalah kontraktor bebas. Juga, tiada keterangan yang menunjukkan bahawa MTD Prime mengawal pelaksanaan sebenar kerja-kerja oleh Ireka Construction.

(3) Berkenaan tuntututan liabiliti penghuni, prinsip yang sama terpakai. MTD Prime mengamanahkan kerja-kerja kepada Ireka Construction dan tidak terlibat secara langsung dengan kerja-kerja yang menyebabkan kemalangan tersebut. Tiada isu sama ada MTD Prime bertanggungan secara langsung kepada plaintif. Atas sebab-sebab ini, tiada sebarang liabiliti terhadap MTD Prime. Oleh itu, gangguan oleh Mahkamah Tinggi dalam hal ini adalah tidak wajar. Dalam keadaan ini, rayuan MTD Prime iaitu rayuan 372 harus berjaya.

(4) Hakim Mahkamah Sesyen tersalah arah secara serius dalam menentukan kecuaian plaintif. Ini jelasnya adalah pendekatan yang salah. Tugas utama hakim bicara adalah untuk menentukan kecuaian defendan. Hanya selepas penentuan tersebut pertimbangan sumbang cuai boleh dibuat. Jika Hakim Mahkamah Sesyen mengikuti pendekatan ini, Hakim Mahkamah Sesyen akan membuat dapatan, sepertimana Hakim Mahkamah Tinggi, bahawa kecuaian telah dibuktikan terhadap Ab Khaid. Walau bagaimanapun, oleh kerana plaintif memandu pada kelajuan yang tidak selamat, ini menyumbang kepada kemalangan. Dalam keadaan ini, sumbang cuai plaintif sebanyak 30% bukannya satu penilaian yang tidak munasabah.

(5) Ireka Construction mengakui milikan jentolak dalam pembelaannya. Ia selanjutnya mengakui bahawa Ab Khaid menjalankan operasi jentolak tersebut dengan keizinan Ireka Construction. Ab Khaid adalah ejen Ireka Construction ketika mengendalikan jentolak pada masa kemalangan. Oleh itu, liabiliti secara vikarius Ireka Construction tidak boleh diragukan.

(6) Ab Khaid dan Ireka Construction juga berusaha untuk mengelakkan liabiliti atas alasan bahawa oleh kerana LPT adalah di bawah pembinaan dan tidak diwartakan sebagai lebuh raya, ia tidak terangkum dalam definisi statutori 'jalan' di bawah s. 2 Akta Pengangkutan Jalan 1987 ('Akta'). Adalah dihujahkan bahawa ini bukan satu kemalangan jalan raya tetapi kemalangan tapak pembinaan. Hujahan ini tidak mengendahkan definisi penuh 'jalan' di bawah s. 2 sebagai 'jalan' bermaksud mana-mana jalan awam dan mana-mana jalan lain yang orang ramai mempunyai akses. Definisi ini juga merangkumi jalan di bawah pembinaan. Oleh itu, penghujahan Ab Khaid dan Ireka Construction adalah tanpa merit. Kesannya adalah MTD Prime tidak menanggung liabiliti dalam kemalangan ini.

Case(s) referred to:

Divian Micheal Augustin Paes v. Mohd Falil Md Amin & Anor [2013] 7 MLJ 313 ***(refd)***
Honeywill and Stein Ltd v. Larkin Brothers Ltd [1934] 1 KB 191 ***(refd)***
Lim Gim Seah v. Lokman Talib & Ors [2012] 5 CLJ 561 CA ***(refd)***
Salsbury v. Woodland [1970] 1 QB 324 ***(refd)***
See Wan Chon v. Chua Ka Bu [1990] 1 LNS 28 HC ***(refd)***
Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Anor [2011] 1 CLJ 409 FC ***(refd)***

Legislation referred to:

Mental Health Act 2001, ss. 2, 51, 52
Road Transport Act 1987, s. 2
Rules of Court 2012, O. 76 rr. 1, 2(1)
Subordinate Courts Act 1948, s. 65

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[Editor's note: Appeal from High Court, Kuantan; Civil Appeal No: 12BNCVC-120-12-2013 (overruled in part).]

Reported by Sandra Gabriel

JUDGMENT

Harmindar Singh Dhaliwal JCA:

[1] There are two appeals before us (Appeal 372 and Appeal 365). The appeals are against the decision of the High Court at Kuantan dated 20 October 2014. They concern a claim originating in the Sessions Court Kuantan involving a motor vehicle accident that occurred on the 26 July 2004. These appeals were ordered to be heard together. For convenience, the parties will be referred to as they were in the Sessions Court or by their abbreviated names.

[2] The third defendant ("MTD Prime") was the main contractor in charge of the construction of the Pantai Timur Highway ("LPT"). The plaintiff was the employee of a company, Q-Free Sdn Bhd ("Q-Free"), which was in charge of supplying, installing and testing the toll system at LPT. At the material time the plaintiff was the driver of the car bearing registration number WLK 4500 ("the said car").

[3] The first defendant was the employee of Ireka Engineering & Construction Sdn Bhd ("Ireka Engineering"), a subsidiary company of the second defendant ("Ireka Construction"). The first defendant was also the driver of the bulldozer bearing registration number BCT 7086 ("the bulldozer") which was owned by Ireka Construction. Ireka Construction was the subcontractor hired by MTD Prime to perform works in the construction of the LPT.

[4] On 26 July 2004, at about 1.30pm, the plaintiff was driving along the road at KM 200 LPT from Maran heading towards Gambang. At that time, the first defendant was driving the bulldozer at the other side of the road from the direction of Gambang to Maran. The first defendant suddenly made a U-turn into the plaintiff's right of way. As a consequence, the plaintiff's car collided with the bulldozer, and the plaintiff suffered serious injuries. It was not disputed that at the time of the accident, the LPT was not opened to the public.

[5] On 19 July 2010, the plaintiff commenced an action at the Kuantan Sessions Court against the first, second and third defendants claiming damages for injuries suffered. On 17 December 2013, the Sessions Court after a full trial held that the plaintiff was 90% liable for the accident. The first defendant was held 10% liable in negligence. The second and third defendants were held not liable and the claim against them was dismissed.

[6] On 19 December 2013, the plaintiff appealed against the Sessions Court's decision to the Kuantan High Court. On 20 October 2014, the Kuantan High Court allowed the appeal and varied the Sessions Court's decision in that the plaintiff was held 30% liable for the accident and the first, second and third defendants were found to be 70% liable. The third defendant (MTD Prime) and the first and second defendants lodged separate appeals, namely, Appeal 372/2014 and Appeal 365/2014 respectively.

At the Sessions Court

[7] The salient grounds of decision by the Sessions Court can be stated as follows:

(a) The plaintiff was driving fast when he collided with the bulldozer. The impact of the collision was overwhelming until it had caused "total loss" to the car driven by him. On balance of probability, the court found that the long braking mark was the result of fast driving by the plaintiff; and

(b) The lack of safety or warning signboards was not an issue as the road was not opened to the public. The court was satisfied that safety briefings were sufficiently given before the workers were allowed to enter the construction area. The safety and warning signboards were only required if the road had been opened to the public use and did not tantamount to be the main cause of the accident.

At the High Court

[8] The salient grounds of judgment by the High Court were as follows:

(a) If the first defendant did not make the U-turn, the accident would not have happened;

(b) It cannot be ascertained with certainty from any evidence available that the plaintiff was speeding;

(c) The second defendant's subsidiary company, Ireka Engineering, allowed the first defendant to drive the bulldozer during the accident when he had no licence;

(d) The bulldozer belonged to the second defendant. As such, the second defendant is vicariously liable; and

(e) The third defendant as the main contractor which appointed the second defendant had failed to ensure the safety of the passage at LPT. In particular, it had failed to ensure that the LPT was safe for the plaintiff and is therefore also vicariously liable in negligence.

Appeal 372 by MTD Prime

[9] Based on the plaintiff's pleaded case, the plaintiff's cause of action against MTD Prime is premised on occupier's liability. This was conceded by learned counsel for the plaintiff. The issue of vicarious liability was never part of the plaintiff's pleaded case against MTD Prime. The Sessions Court, in holding that MTD Prime was not responsible for the accident, held that MTD Prime did not breach its occupier's duty.

[10] On appeal, the High Court however found liability against both the second and third defendants on the basis of vicarious liability. In particular, the High Court found MTD Prime vicariously liable for the conduct of Ireka Construction in allowing it to use its bulldozer which caused the accident. It appeared that vicarious liability was attributed on account of MTD Prime being the main contractor of the LPT and having appointed Ireka Construction as its sub-contractor.

[11] In view of the foregoing, we are therefore in agreement with learned counsel for MTD Prime that the learned High Court Judge had misapprehended the claim of the plaintiff. The High Court in essence had failed to decide the appeal based on the plaintiff's pleaded case. On this score

alone, any liability held against MTD Prime should be set aside. In any event, no cross-appeal was filed by the plaintiff on this finding of the High Court.

[12] Be that as it may, and as a matter of law, the main contractor cannot be held vicariously liable for the negligence of the subcontractor who is in effect an independent contractor (*Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Anor* [2011] 1 CLJ 409). This court in *Lim Gim Seah v. Lokman Talib & Ors* [2012] 5 CLJ 561; [2012] 4 MLJ 308 had cited with approval a passage from the judgment of Lord Justice Widgery in the case of *Salsbury v. Woodland* [1970] 1 QB 324 at pp. 336-337:

> It is trite law that an employer who employs an independent contractor is not vicariously responsible for the negligence of that contractor. He is not able to control the way in which the independent contractor does the work, and the vicarious obligation of a master for the negligence of his servant does not arise under the relationship of employer and independent contractor. I think that it is entirely accepted that those cases - and there are some - in which an employer has been held liable for injury done by the negligence of an independent contractor are in truth cases where the employer owes a direct duty to the person injured, a duty which he cannot delegate to the contractor on his behalf. The whole question here is whether the occupier is to be judged by the general rule, which would result in no liability or whether he comes within one of the somewhat special exceptions - cases in which a direct duty to see that care is taken rests upon the employer throughout the operation. This is clear from authority; and for convenience I take from Salmond on *Torts*, (14th Ed), (1965), p 687, this statement of principle:
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> > One thing can, however, be said with confidence: the mere fact that the work entrusted to the contractor is of a character which may cause damage to others unless precautions are taken is not sufficient to impose liability on the employer. There are few operations entrusted to an agent which are not capable, if due precautions are not observed, of being sources of danger and mischief to others; and if the principal was responsible for this reason alone, the distinction between servants and independent contractors would be practically eliminated from the law.

[13] In the instant action, there appeared to be no dispute that Ireka Construction was an independent contractor. In any case, no evidence was led to show that MTD Prime was in control of the actual performance of the works by Ireka Construction (see *Honeywill and Stein Ltd v. Larkin Brothers Ltd* [1934] 1 KB 191). It appeared that the manner in which the works were to be done was left to Ireka Construction. Now there may be instances where the law may impose a direct duty on the employer which cannot be delegated to an independent contractor. However this was also not the pleaded case and was never raised as an issue.

[14] Even on the claim under occupier's liability, the same principle applies. It was plain that MTD Prime had entrusted the works to Ireka Construction and was not directly involved with the works which resulted in the accident. There was no issue of whether MTD Prime owed a direct duty to the plaintiff in the sense that it was a non-delegable duty to ensure the highway under construction was safe. For these reasons, there can be no liability against MTD Prime. As such, the interference by the High Court in this regard was unwarranted. For these reasons, the appeal by MTD Prime must succeed.

Appeal 365 By First And Second Defendants

[15] To recap, the learned Sessions Court Judge took the view at the end of the trial that the plaintiff was driving too fast and held him to be 90% negligent. The High Court on the other hand found insufficient evidence to show that the plaintiff was speeding and instead opined that it was mainly the fault of the first defendant in making the U-turn that caused this accident.

[16] In this connection, we are compelled to observe at the outset that the learned Sessions Court Judge was in serious error when she embarked right away in determining the negligence of the plaintiff. This was clearly the wrong approach. The duty of the trial judge in such cases is to first determine negligence of the defendants by considering the particulars of negligence provided in the pleadings and the evidence adduced at the trial. It is only after this determination that a consideration of contributory negligence would follow again based on the pleadings and the evidence (*Divian Micheal Augustin Paes v. Mohd Falil bin Md Amin & Anor* [2013] 7 MLJ 313).

[17] It may well be the case in the end that no negligence is proved against the defendants and hence the question of contributory negligence may not arise. It may also transpire that the contributory negligence is higher in the event that negligence is proved. Whatever may be the case, it would be helpful if the trial court follows this approach and provide reasons for its finding on both negligence and contributory negligence.

[18] In the instant case, if the learned judge had followed this approach, she would have determined, as the learned High Court Judge found, that negligence was proved against the first defendant. The material allegations of negligence of the defendants were proved by the evidence of SP4, a passenger in the said car driven by the plaintiff and the neutral evidence of the sketch plan, the photographs of the scene of the accident and the damage to the vehicles involved.

[19] The evidence of negligence against the first defendant was then fortified when he admitted to making a U-turn on the highway with his bulldozer into the rightful path of the plaintiff's motorcar. Significantly he admitted during cross-examination that he was not aware of the plaintiff's motorcar until he heard the brakes of the car followed by the sound caused

by the collision. In the circumstances, appellate intervention by the High Court was clearly warranted as by no measure can the finding of 90% negligence on the part of the plaintiff be supported by the evidence.

[20] Now the High Court in reversing the finding of liability determined that the defendants' liability was at 70% and the plaintiff's contribution at 30%. However what is curious is that although the learned judge found no evidence of speeding on the part of the plaintiff, the plaintiff was nevertheless found 30% liable for the accident. No reasons appear to be provided as to how the plaintiff contributed to the accident. As we had alluded to earlier, reasons must always be provided for any determination of liability whether primary or contributory.

[21] Notwithstanding the paucity of reasons, it does appear to us from the evidence that the plaintiff at the relevant time was driving his car at an unsafe speed when all the circumstances are taken into account. In particular, the sketch plan showed a braking mark of 56.6m (or 185.696 feet) which does suggest that the car was travelling at some speed. There was reliance by both parties on the *Bingham*'s table for braking distances but it should be noted that technology in the braking system of motorcars advances so quickly that common sense will inform us that braking distances will now be much shorter than before.

[22] What is also significant is that the plaintiff's car did not come to a complete stop after the impact but skidded some 14.2m. The severe damage to the car into the almost stationary bulldozer also suggests a momentum of not insignificant speed. The highway was still being completed and due care and caution was warranted. In our considered view, there is more than sufficient evidence that the plaintiff's car was being driven at an unsafe speed and this would certainly have contributed to the accident.

[23] In the circumstances, contributory negligence on the part of the plaintiff to the tune of 30% would not be an unreasonable assessment. We would accordingly affirm the finding of the learned High Court Judge on liability although on somewhat different grounds. Additionally, the vicarious liability of the second defendant cannot be doubted. The second defendant had admitted ownership of the bulldozer BCT 7086 in its pleaded defence. It was further admitted that the first defendant was operating the bulldozer with the second defendant's consent. So although the first defendant was an employee of Ireka Engineering, he was most certainly an agent of the second defendant when operating the bulldozer at the time of the accident.

[24] There was also no question that the plaintiff was not a trespasser on the LPT. There was evidence that the plaintiff was a senior manager of Q-Free Sdn Bhd. The company was involved in setting up and testing the toll system. The plaintiff and his passengers in the car were therefore not on a frolic of their own but were present on the LPT on legitimate business and for this purpose it can hardly be denied that they had permission to use the

LPT. That was the only way in which they could carry out their functions. The trial court came to this very conclusion which was affirmed on appeal. We find no reason to interfere with this finding. In the premises, the argument that the plaintiff was a trespasser and had no right to be on the LPT is without merit.

[25] Now there were also other issues raised by the first and second defendants in their appeal against the decision of the High Court. It was contended on behalf of the defendants that the plaintiff had no *locus standi* to bring this action as he lacked the mental capacity to do so. As a general rule under O. 76 r. 2(1) of the Rules of Court ("ROC 2012"), a person under disability does not have the capacity to bring proceedings in court. Order 76 r. 2(1) of the ROC 2012 provides:

> A person under disability may not bring, make a claim in, defend, make a counterclaim in, or intervene in any proceedings, or appear in any proceedings under a judgment or order notice of which has been served on him, except by his litigation representative.

[26] Order 76 r. 1 of the ROC 2012 in essence provides that a person under disability is a person who is a minor or a patient. A "patient" means a "mentally disturbed person" within the meaning of the Mental Health Act 2001. Section 2 of the Mental Health Act 2001 defines the meaning of "mental disorder" as follows:

> "Mental disorder" means any mental illness, arrested or incomplete development of the mind, psychiatric disorder or any other disorder or disability of the mind however acquired; and "mentally disordered" shall be construed accordingly.

[27] However, what is of greater significance for the purpose of this appeal is the definition of a "mentally disordered person" as set out in s. 51 of the Mental Health Act 2001. The said s. 51 provides that a "mentally disordered person" means any person found by due course of law to be mentally disordered and incapable of managing himself and his affairs. The law in the form of s. 52 of the Mental Health Act 2001 requires that an inquiry be held before any person is declared to be a mentally disordered person.

[28] In the instant case, the plaintiff cannot be said to be a mentally disordered person as he has not been so found by due course of law to be mentally disordered and incapable of managing himself and his affairs. This by itself is sufficient to defeat the argument raised by the defendants (*See Wan Chon v. Chua Ka Bu* [1990] 1 LNS 28; [1990] 2 MLJ 460). In any event, the evidence adduced at the trial did not even remotely suggest that the plaintiff was mentally disordered. No doubt he had suffered serious injuries and this has, amongst others, impaired his ability to recall events. This does not necessarily equate to him being mentally disordered. He was after all able to give evidence in court although he had little recollection of the accident.

[29] We also note that this issue was not raised at the trial. It was only raised during the appeal before the High Court. The parties at the trial court had possession of all the medical records concerning the disabilities of the plaintiff. No issue was raised as to the mental capacity of the plaintiff. The High Court was right to reject this issue of *locus standi*. For the reasons that we have provided, we see no reason to interfere with the decision of the High Court in this regard. As we had alluded to earlier, this issue of lack of mental capacity is a non-starter on both legal and factual grounds.

[30] The first and second defendants also sought to evade liability on the ground that since the LPT was under construction and not gazetted as a highway, it could not come within the statutory definition of "road" under s. 2 of the Road Transport Act 1987. It was accordingly asserted that this was not a road accident but a construction site accident. With respect, this argument overlooks the full definition of "road" under the said s. 2 as "road" means any public road and any other road to which the public has access. For good measure, the definition also includes a road under construction. This contention is therefore without merit.

[31] For completeness, we would also add that the arguments raised with respect to the jurisdiction of the Sessions Court to award damages and the application of the Employees' Social Security Act 1969 are non-starters. As this was a claim in respect of a motor vehicle accident, the Sessions Court had unlimited jurisdiction to try such an action by virtue of s. 65 of the Subordinate Courts Act 1948. The Employees' Social Security Act 1969 could not apply to the plaintiff as he was not an employee of the defendants and they were not his employers.

Conclusion

[32] In the circumstances, and for the reasons stated, we find no appealable error to warrant interference with the decision of the High Court in respect of Appeal 365 of 2014. Accordingly we dismiss the appeal with costs. As for Appeal 372 of 2014, we agree that the decision of the High Court was plainly wrong. We allow the appeal and set aside the order of the High Court and restore the order of the Sessions Court. The net effect is that the third defendant incurs no liability in this accident. As for costs, in respect of Appeal 365 of 2014, we order the first and second defendants to pay a sum of RM10,000 to the plaintiff as costs here and below. In respect of Appeal 372 of 2014, we order the plaintiff to pay a sum of RM10,000 to the third defendant as costs here and below. Order accordingly.